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Supreme Court, U.S.
FILED

CASE NUMBER: 95-316 JUL 25 1995

OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

1995 TERM

JEFFREY J. GRENELL, Petitioner

VS.

STATE OF NEW JERSEY, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JEFFREY J. GRENELL
Plaintiff, attorney pro se
P. O. Box 31
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28 pp

QUESTION PRESENTED FOR REVIEW

Does Eleventh Amendment immunity differ from legislatively conferred immunity?

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REPORTS OF OPINIONS

Neither Judge Sarokin's September 26, 1994 opinion (A1) nor the court of appeals judgment order (A10) was published.

GROUNDS OF JURISDICTION OF THIS COURT

Date of Entry of Judgment Sought to be Reviewed

April 27, 1995

Statutory Jurisdiction of this Court

28 U.S.C. § 1254(1)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

Amendment XI, Constitution of the United States

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

N.J.S.A. 52:4A-1 (L.1970, c. 98)

Except for actions founded upon the Constitution of this State or the United States or an express provision of the statutory laws of this State, no action shall be instituted or continued against the State or any department or other agency thereof for the recovery of money damages, based on tort, where the cause of action accrues prior to July 1, 1972.

STATEMENT OF THE CASE

Plaintiff sued a state in the district court for money damages, averring that his property had been seized, with no hearing, process, or notice (A12); further averred was that the purpose of the unlawful seizure had been to force plaintiff's silence (Id., ¶ 5.) The district judge dismissed the complaint on Eleventh Amendment grounds. (A6) A three-judge panel in the Court of Appeals, Third Circuit, unanimously

adopted the district judge's opinion. (A10)

BASIS OF JURISDICTION IN THE COURT OF FIRST INSTANCE

Plaintiff's complaint (A12) contained the following Statement of Jurisdiction [Fed.R.Civ.Proc. 8(a)(1)].

> This action arises under the Fourteenth (¶ 1) and First Amendments of the Constitution of the United States. Plaintiff is a citizen of the United States.
>
> Jurisdiction is founded pursuant to 28 U.S.C. § 1331 ("civil actions arising under the Constitution of the United States") and the defendant's legislature's consent to suit for "actions founded upon the Constitution of the United States for the recovery of money damages, based on tort," expressed in N.J.S.A. 52:4A-1. [L. 1970, c. 98, § 1]

ARGUMENT

The judicial power of the United States ordinarily does not extend to an

individual's suit against a state for money. Hans v. State of Louisiana, 134 U.S. 1 (1890); U.S. Const, amend. XI. Federal courts must afford a state sovereign immunity, unless legislation requires otherwise. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 241 (1985); Hans, supra, at 21.

New Jersey "clearly and unambiguously" [Strauss v. State, 131 N.J.Super 571, 575 (Law Div. 1974)] legislated express consent to suit for "tort actions for money founded upon the Constitution of the United States"

[N.J.S.A. 52:4A-1* (L. 1970, c. 98, § 1)]. The Eleventh Amendment is not applied to consenting states. Kennecott Copper Corp. v. State Tax Com'n, 327 U.S. 573 (1946); see, Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 304 (1990).

A United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this court, to wit: Can a

*52:4A-1 is consonant with New Jersey's common law that sovereign immunity is not applicable in cases founded on statutory obligation. O'Neill v. State Highway Department, 50 N.J. 307, 316 (1967); East Orange v. Palmer, 47 N.J. 307, 327-329 (1966); Bruder v. Teachers' Pension & Annuity Fund, 27 N.J. 266, 270-271 (1958); Jersey City v. Zink, 133 N.J.L. 437, 439-440 (E. & A. 1945), cert. denied, 326 U.S. 797 (1946). See, Cashen v. Spann, 125 N.J.Super. 386 (App.Div. 1973), modified and aff'd 66 N.J. 541 (1975), cert. denied, 423 U.S. 829 (1975) and Strauss v. State, supra.

state invoke Eleventh Amendment immunity after its legislature consents to be sued for money damages? The lower courts' affirmative decision of that question despite legislative consent, conflicts with this court's holdings in Hans v. State of Louisiana, supra, and Kennecott Copper Corp. v. State Tax Com'n, supra, mocks the republicanism continuously fostered by the Constitution (Art. I, § 2; Art. IV, § 4; Amend. XV; Amend. XVII, § 1, cl. 2; Amend. XIX; Amend. XXIII; Amend. XXIV; Amend. XXVI), and debases the universally acknowledged right of sovereigns to legislate suability (Hans, supra, at 13, 16 and 17; Kennecott, supra, at 580).

In light of the foregoing, it is respectfully submitted that a writ of certiorari should issue to the Court of Appeals, Third Circuit to review the judgment entered there and in the United States District Court for New Jersey.

/s/ Jeffrey J. Grenell
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Plaintiff's Complaint (filed May 31, 1994)	12a

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JEFFREY J. GRENELL,	:	
Plaintiff,	:	Civ. No. 94-2539 (HLS)
v.	:	OPINION
STATE OF NEW JERSEY,	:	
Defendant	:	

Sarokin, District Judge

Before the court is defendant's motion to dismiss.

Background

Plaintiff Jeffrey Grenell alleges that in or about March 1992, the State of New Jersey seized certain unspecified property belonging to him, in order "to punish previous speech and writing of plaintiff." Complaint, ¶1.5. Plaintiff sued seeking money damages for violations of the First and Fourteenth Amendments of the U.S. Constitution.

Defendant State of New Jersey moves to dismiss on the grounds that it is immune from suit under the Eleventh Amendment, and in the alternative that it is not a "person" that can be sued under 42 U.S.C. §1983, were the court to construe the Complaint as raising as §1983 claim.

Discussion

This court will grant a motion to dismiss if, reading all inferences of the complaint in plaintiff's favor, there is no set of facts on which plaintiff could prevail. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

The U.S. Supreme Court has read the Eleventh Amendment to establish that "'an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of

another state.'" Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 304 (1990), quoting Employees of Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279, 280 (1973).[1] This immunity bars suits for money damages, Quern v. Jordan, 440 U.S. 332, 337 (1979). States may consent to suit in federal court, Atascadero State Hospital v. Scanlon, 473 U.S. 234, 241 (1985), but courts will uphold a waiver of immunity "'only where stated by the most express language or by such overwhelming implication from the

---

[1]The fundamental illogic of the holding that the Eleventh Amendment provides states a blanket immunity, despite the limitation of the Amendment's plain language to suits "by Citizens of another State, or by Citizens or Subjects of any foreign State," has been noted. See Feeney, 495 U.S. at 309-11 (Brennan, J., concurring).

text as [will] leave no room for any other reasonable construction.'" Feeney, 495 U.S. at 305-06, quoting Atascadero, 473 U.S. at 239-40 (citations omitted).

Plaintiff argues that New Jersey consented to be sued in constitutionally-based tort actions in N.J.S.A. §52:4A-1:

> Except for actions founded upon the Constitution of . . . the United States . . . no action shall be instituted or continued against the State . . . for the recovery of money damages, based on tort, where the cause of action accrues prior to July 1, 1972. (emphasis added)

By its own terms, this statute applies to causes of action arising before July 1, 1972, and in no way serves as "express language" waiving the state's Eleventh Amendment immunity to suit in federal court.

Nor can the state's consent to be sued in federal court be implied from this statute, as the history of its enactment demonstrates. N.J.S.A. §52:4A-1 was passed in June, 1970, weeks after the Supreme Court of New Jersey had abolished the State's common-law sovereign immunity from tort actions in state court. See, Willis v. Dept. of Conservation & Economic Development, 55 N.J. 534, 264 A.2d 34 (1970); Strauss v. State, 131 N.J. Super. 571, 574, 330 A.2d 646 (Law Div. 1974). The Act effected a moratorium, later extended through July 1, 1972, on non-constitutionally-based tort claims against the state while the Legislature prepared comprehensive legislation, which it enacted as the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et seq.. Strauss, 131 N.J. Super.

at 574. The Tort Claims Act affirmed the state's basic immunity to suit in state court, Pinckney v. Jersey City, 140 N.J.Super. 96, 355 A.2d 214 (1976)(Act reestablishes sovereign immunity, then grants conditional waivers therefrom), and did not waive the state's Eleventh Amendment immunity to suit in federal court. Ritchie v. Cahall, 386 F.Supp. 1207 (D.N.J. 1974).

In sum, N.J.S.A. 52:4A-1 expressed the state's consent to be sued in state court for claims arising between the Willis decision in April 1970 and the effective date of the Tort Claims Act, July 1, 1972. Neither statute expressed a waiver of the state's Eleventh Amendment

immunity from suit in federal court, however.[2]

Conclusion

For the foregoing reasons, defendant's motion to dismiss is granted.

/s/ H. Lee Sarokin
H. LEE SAROKIN
U.S. DISTRICT JUDGE

Date: September 26, 1994

Original to: Clerk, U.S. District Court

Copies to: Joel A. Pisano,
U.S. Magistrate Judge

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(Pro se plaintiff)

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[2]Reading the Complaint to imply a claim pursuant to 42 U.S.C. §1983 would yield the same result, as a state is not a "person" pursuant to §1983 when sued for money damages. Will v. Michigan Dep't of State Police, 491 U.S. 58, 64 and n.10 (1989).

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
VICINAGE OF NEWARK

JEFFREY J. GRENELL, Plaintiff	HONORABLE H. LEE SAROKIN
v.	Civil Action No. 94-2539 (HLS)
STATE OF NEW JERSEY, Defendant	ORDER

This matter having come before the Court on a motion of Deborah T. Poritz, Attorney General of New Jersey, by Jeanne Habib, Deputy Attorney General, appearing on behalf of defendant State of New Jersey, and the Court having considered the papers submitted herein, and for good cause shown;

IT IS on this 26 day of Sept, 1994;

ORDERED that defendant's motion to dismiss plaintiff's complaint be and hereby is granted pursuant to Fed.R.Civ.P. 12(b)(6).

/s/ H. Lee Sarokin
H. Lee Sarokin, U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 94-5628

JEFFREY J. GRENELL
Appellant

v.

STATE OF NEW JERSEY

On Appeal from the United States
District Court
For the District of New Jersey
(D.C. Civil Action No. 94-cv-02539)
District Judge: Honorable H. Lee Sarokin

Submitted Under Third Circuit LAR 34.1(a)
April 17, 1995

BEFORE: STAPLETON, HUTCHINSON and SEITZ
Circuit Judges

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ORDERED AND ADJUDGED that, for the reasons stated in Judge Sarokin's opinion entered September 28, 1994, the order of the district court entered September 28, 1994, be and the same is hereby affirmed.

Costs taxed against appellant.

By the Court,

/s/ Walter K. Stapelton
Circuit Judge

ATTEST:

/s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

DATED: Apr 27 1995

JEFFREY J. GRENELL
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JEFFREY J. GRENELL	:	UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
Plaintiff	:	
vs.	:	CIVIL ACTION NO. 94-2539 (HLS)
STATE OF NEW JERSEY	:	Civil Action
Defendant	:	COMPLAINT

Plaintiff, JEFFREY J. GRENELL, residing at Drew Mountain Road, Vernon, New Jersey, whose post office address is P. O. Box 31, Vernon, New Jersey 07462, by way of complaint, says:

STATEMENT OF JURISDICTION

This action arises under the Fourteenth (§ 1) and First Amendments of the Constitution of the United States. Plaintiff is a citizen of the United States.

Jurisdiction is founded pursuant to 28 U.S.C. § 1331 ("civil actions arising under the Constitution of the United States") and the defendant's legislature's consent to suit for "actions founded upon the Constitution of the United States for the recovery of money damages, based on tort," expressed in N.J.S.A. 52:4A-1.

STATEMENT OF CASE

1. In or about March 1992, defendant seized and declared forfeit certain property of the plaintiff.

2. Prior to the seizure, defendant afforded plaintiff no opportunity to be heard.

3. Prior to the seizure, defendant did not serve plaintiff with process or otherwise notify plaintiff of the

commencement of proceedings against plaintiff.

4. Despite repeated demand, defendant refuses to provide plaintiff with any record of proceedings conducted prior to the seizure.

5. The purpose of the aforesaid seizure was to punish previous speech and writing of plaintiff and restrain further exercise of such right by the plaintiff.

6. As a result of the actions of the defendant as aforesaid, plaintiff has been deprived of rights secured to him under the Constitution and laws of the United States.

7. As a result of the deprivation of rights as aforesaid, plaintiff has suffered physical and emotional

damage, damage to his reputation, and damage to his business.

WHEREFORE, plaintiff demands judgment against the defendant for damages, punitive and exemplary damages, interest, and costs of suit to be taxed.

Dated: May 25, 1994 /s/Jeffrey J. Grenell
JEFFREY J. GRENELL
Plaintiff,
Attorney pro se